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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

MINERAL RESOURCES, LLC Employer, vs. OPERATING ENGINEERS LOCAL UNION 3, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO Petitioner.	Case No.: 20-RC-125608 **PETITIONER OPERATING ENGINEEERS LOCAL UNION 3'S BRIEF IN OPPOSITION TO EMPLOYER'S OBJECTION TO CONDUCT OF THE ELECTION**

Petitioner, OPERATING ENGINEERS LOCAL UNION NO. 3 ("LOCAL 3"), submits the following brief in opposition to the Objections to the Conduct of the Election in the above-captioned matter.

I. OBJECTIONS 1 THROUGH 5 SHOULD BE DISMISSED.

A. Carey Neely Jr. Was Not A Statutory Supervisor During The Critical Period

1. Governing Legal Principles

The burden of proving that an employee is a statutory supervisor rests with the party asserting such status. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). That party must not only prove the challenged employee holds authority in at least one of twelve supervisory functions listed in Section 2(11), but also must show that the employee exercises independent judgment in carrying out said function(s) and does not merely act due to company routine, procedure or policy. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006). This is a "significant qualification." *Highland Superstores, Inc. v. NLRB*, 927 F.2d 918, 920 (1991). "In adding this limitation, Congress intended to withhold section 2(11) supervisory status from straw bosses, leadmen, and other low-level employee having modest supervisory authority." Id. (citations and quotations omitted).

In addition, the Board has warned against construing supervisory status too broadly "because the employee who is deemed a supervisor is denied rights which the Act is intended to protect." *Id.* at 688*; Holly Farms Corp. v. NLRB* 517 U.S. 392, 399 (1996); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). Thus, a stiff burden faces any employer to show supervisory status. *AVI Foodsystems, Inc.*, 328 NLRB 426 (1999). This is made more difficult given that the burden must be proven by a preponderance of the evidence. *Dean & Deluca*, 388 NLRB 1046, 1047 (2003). Mere inferences or conclusory statements unsupported by detailed, specific evidence are insufficient to establish supervisory authority. *Chevron, USA*, 309 NLRB 59 (1992); *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Stated differently, what is required to prove supervisory status is "evidence of actual existence of such authority." *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). As the Board has made quite clear, "whenever evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, it will find that the supervisory status has not been established ...." *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

2. Summary of Salient Facts

The Employer is in the business of mining and producing sand. At its most basic, that involves the removal of "overburden", soil on top of the sand, then the pushing of sand off the hill, where it is scooped up by a front-end loader, transferred to a conveyor belt, fed into the "wet plant" where it is washed, scrubbed, cleaned, and sized and then stockpiled according to its various characteristics and eventually loaded onto trucks that haul the material off-site to customers. The operation has been the same since at least 2009 and the plant is currently operating twenty-four hours a day, seven day a week.

The workers who carry out the running of the plant fall into a few general classifications. They include equipment operators who operate heavy duty construction equipment such as front-end loaders and dosers. Also included are plant operators whose duties are to make sure the plant that processes the sand does so properly and produces as much as possible. Also included are mechanics who specialize in fixing equipment in need of repair and plant laborers who help out the other positions as needed and perform clean up work.

As described by Carey Neely Jr., the work at the plant is extremely routine. Each position performs a series of repetitive tasks performed throughout each shift and done the same way from day to day. Employees are cross-trained to be able to run things in the same manner as their co-workers and it is not uncommon for them to switch assignments throughout a shift in order to keep the plant running efficiently. In sum, everyone knows what needs to get done and chips in wherever needed to see that it does get done.

Carey Neely testified on that on September 27, 2013, he was removed from foreman to day shift lead man. At that point he was stripped of whatever supervisorial duties he may have had now that there was a full-time on-site, wet plant specific Plant Manager, Ray Briseno (and then later Mike Butler). Previously, management of the wet plant was the part-time duty of Ted Hale who only spent a moderate amount of time at the plant given his other duties with another employer and its own processing plant.

Subsequent, to Briseno's hiring, Neely testified that he had no authority to hire employees or recommend hiring, transfer or recommend transfer, discipline, discharge, or suspend employees nor did anyone seek his input on disciplinary matters; that he could not layoff employees nor recall them from lay off; could not reward employees nor was he asked for input on other employees compensation; was never told he was responsible for the work of others or that he would be held responsible if others failed to perform their work properly.

Nor did he assign employees work. Rather, assignments were already "designated" and the work extremely routine. Work assignments of such a routine nature to equalize workload and address production demands do not require the exercise of independent judgment. *Ohio Masonic Home,* 295 NLRB 390, 395 (1989); *Providence Hospital*, 320 NLRB 717, 729 (1996) (Section 2(11) supervisory authority does not include the authority of an employee to direct another to perform discrete tasks stemming from the directing employee's experience, skills, training, or position."). Instruction "dictated solely and routinely by the specific demand of each production job" does not a supervisor make. *Print-O-Stat, Inc.*, 247 NLRB 272 (1980).

The Employer's proffered evidence of supervisory authority does not withstand examination.

a. Interview of Hadley and Snowden

Plant Manager Briseno testified that Neely interviewed two employees, Curtis Hadley and Jess Snowden. However, Briseno admitted that he had Neely interview the two men on the same evening because of a conflict in Briseno's calendar and that he had pre-screened both men prior to having Neely meet them. Mr. Neely unequivocally stated that he ever hired any employee during the time he was a leadman on the night shift or the day shift. Putting that aside for the moment, providing an opinion on whether someone has the skills necessary to perform work does not equate to effectively recommending under the Act. *Ryder Truck Rental, Inc.*, 326 NLRB 1368, 1387 (1998); *The Door*, 297 NLRB 601, 602 (1990); *Kenosha News Publishing Co.*, 264 NLRB 270, 271 (1982). This is especially true where a higher level authority, such as Mr. Briseno, participated in the hiring process. *Waverly-Cedar Falls Health Care,* 297 NLRB 390, 392 (1989). It has been made very clear that an employee who may perform an evaluation of another's skills does not suffice to be a statutory supervisor. *Williamette Industries, Inc*., 336 NLRB 743, 743-744 (2001).

b. *Discipline of Codey Hosiuf*

The discipline of Mr. Hosiuf during the time that Mr. Neely was no longer a foreman but a night shift leadman became a major focus of the Employer's case. No authority, however, supports the Employer's position that the situation makes Neely a statutory supervisor. Aside from the fact that it occurred while Neely was no longer a foreman, Neely was just following company policy when he reported Hosiuf's condition to his supervisor. Moreover, Mr. Briseno testified that the discipline Hosiuf received was automatic at Mineral Resources. Consequently, even if Neely did discipline Hosiuf, he used no independent judgment or discretion in doing so. But in any event Neely testified quite clearly that he did not terminate Hosiuf. Mr. Briseno did and that is consistent with Briseno's testimony that he had Hosiuf come in the next day and processed his termination.

c. *Discipline of Jason Paloma*

The other example of discipline by Neely the Employer points to involved Josh Paloma. In that case the Employer contends that Neely issued a verbal warning. But the testimony of Paloma himself debunks that characterization. He testified that when he noticed the damaged step to the loader he brought that to the attention of both Neely and Doering, referred to as "JR" who were standing together at shift change. JR commented that he would take care of it and bring it to the plant manager's attention. But neither one said anything about discipline. According to his testimony it was Ray Briseno who issued the warning to him, not Neely. 9Tr. 616, 621). There is no inconsistency between that account and the write up done by the plant manager.

It is also striking that the only written documentation presented by the Employer reflecting supervisory functions by Neely relates to the period of time Neely was working as a foremen before Briseno was hired. Not a single piece of documentary evidence was presented showing he exercised any supervisory function after he was transferred to the night shift.

Bluntly stated, the Employer has failed to adduce substantial evidence to support its contention that Neely was a supervisor during the months immediately preceding the representation election.

B. Carey Neely Jr's. Conduct Did Not Taint The Outcome Of The Election

No matter how the Judge resolves the question of whether Carey Neely Jr was a statutory supervisor during the critical period, the record evidence fails to support the Employer's contention that his election related conduct materially affected the outcome of the election, even if he is found to have been a supervisor.

1. *The Governing Legal Standard.*

In determining whether supervisory prounion conduct taints the laboratory conditions for a fair election the Board applies the following two factors: (1) whether the supervisor's prounion conduct "reasonably tended to coerce or interfere with the employees' exercise of free choice in the election, and (2) whether the conduct interfered with the freedom of choice to the extent that it materially affected the outcome of the election.. The employer bears the burden of proof as to each factor. See, *Madison Square Garden Ct, LLC.* 350 NLRB 117 (2007); *Harborside Healthcare Inc.*, 343 NLRB 906 (2004).

The record reveals that the nature and extent of the prounion conduct of Carey Neely Jr., was extremely limited. It is important to emphasize at the outset that his employment with Mineral Resources was terminated within two or three days of the initial organizing meeting held at a local restaurant where he and other interested employees were in attendance. Thereafter he was not employed in any capacity and thus had no direct access to the facility of the Employer to campaign among the unit employees even had he chosen to do so. The election occurred almost a month after his termination. Those facts are undisputed. Moreover, common sense suggests that employees would not reasonably feel coerced by conduct of an alleged supervisor whose employment had been terminated during the critical period of an election. To the contrary, one would reasonably infer that even a supervisor is not insulated from termination by an employer during a union election campaign. Bluntly stated, one would more likely view such events as intimidating or discouraging support of a union where a supervisor who is allegedly a key advocate of union representation is summarily terminated.

In any event the Employer has failed to establish the Neely engaged in any substantial pro-union activity, much less conduct of the degree and nature considered by the Board to be objectionable in *Harborside* and its progeny. In this regard, the testimony of Local 3 organizer Ron

Roman is most compelling. He credibly explained the genesis of the union's campaign at Mineral Resources and how he conducted the organizing drive. He testified that a call was received by Local 3's District Representative in March 2014 from Scott Armstrong, (Tr. 760); within a few days a meeting was set up at a local restaurant by the employees. Prior to that meeting Roman had no contact with Carey Neely or any other employee; no materials were distributed at the plant and certainly no authorization cards were disseminated by any one before the first meeting. (ibid). He explained how the meeting unfolded, with an initial introduction from himself and other union staff, then it was turned over for questions and answers. (Tr. 763-764). Ron Roman did not know Neely before that first dinner meeting. (Tr. 764).

As the meeting progressed the employees present made it clear they wanted to proceed with filing an election petition and Roman explained the process and passed out authorization cards. (Tr. 765). He categorically stated that, consistent with his practice, he carried cards with him but had not distributed any cards to any employee prior to that meeting, (Tr. 767). Neely played no particular role in disseminating cards, or getting others to sign them. (Tr. 768). In fact it was employee Scott Armstrong who had taken the lead in initiating the organizing contact with the union and who took it upon himself to take some cards from that meeting and drive out to the facility to get signatures from those employees working on the night shift. (Tr. 768). Ron Roman testified that he did not give any extra cards to one for solicitation after the meeting, nor was it necessary as an adequate number to establish a showing of interest were filled out at the meeting itself. (Tr. 7661-767). At no time did he give any authorization cards to Neely to get signed by other employees. (Tr. 769).

Within a couple of days of that first meeting Neely was terminated and Roman's interactions with him thereafter were limited to issues surrounding the termination. (Tr. 770). Neely was never given any written materials to disseminate, nor was he asked by Roman to contact other employees. (Tr. 771). Most of the communications with employees was conducted by Roman via text messaging or phone calls. (Tr. 773). The principal point of contact for the Union during the initial phase of the campaign was with Scott Armstrong not Neely.

Ron Roman's account of the limited role Neely played in the campaign was corroborated by Neely himself and others in attendance at the organizing meetings. Thus, Neely confirmed that he had

not met Ron Roman before the first dinner meeting (Tr. 713); that the meeting was essentially an informational meeting where all had an opportunity to ask questions; (Tr. 714); that he had not been given any authorization cards prior to the meeting; (Tr. 716); and that he never solicited any one to sign the cards. (Tr. 718). After his termination he did not distribute any campaign related materials and only had minimal contact with the employees. (Tr. 718-720).

Witness called by the Employer to testify on this subject also largely supported the account of Ron Roman and Carey Neely. Thus, Corey Gamache who testified that he had been given a card by Neely months before Neely was terminated – testimony which was not credible – admitted that he did not feel threatened by him at the dinner meeting. (Tr. 496-497); that he considered the meeting an informational meeting and that all were told it was their choice whether to support the union or not; (Tr. 499); that no one was trying to intimidate him at the meeting., (Tr. 500), and that it was Ron Roman who handed out the authorization cards. (Tr. 500-501); moreover he admitted on cross-examination that the only time cards were handed out was at that meeting and that Neely did not ask him at that meeting to fill one out. (Tr. 501-502). Joseph Richardson testified along the same lines. (Tr. 516, 518; 519). When asked by Employer counsel if he felt any pressure by Neely to support the Union his explanation was only insofar as he felt some sense of duty to him because he had helped get him his job, he did not attribute any pressure to Neely's alleged supervisory position. (Tr. 519).

Similarly, James Doering testified that Neely did not play any significant role at the meeting he attended. (Tr. 532-533); that cards were distributed by the union representatives.(Tr.533). He did not consider Neely as playing a prominent role at the meeting. (Tr. 544) rather it was Scott Armstrong. (Id.).

The only witness who did attempt to paint Neely as taking on a prominent role in the election campaign was Robert Randall. But his testimony is not worthy of belief for several reasons. First, he testified that the campaign commenced months before the termination of Neely. That was flatly contradicted by several witnesses, including Ron Roman who credibly set for the time frame which had the initial contact with Local 3 toward the end of March 2014 a mere few days before the first meeting at the restaurant and about a week before Neely's termination. Second, he claimed that he had received an authorization card again many weeks in advance of that first meeting. Again, not true

based on Roman's account of first handing out cards at that meeting – which is corroborated by other witnesses who described the events of that meeting.

Third and most importantly, Randall flat lied about the contacts he received from Neely promoting support for the Union. Randall testified that he received about 15 phone calls from Neely's termination urging support for the Union; and a dozen or more after the termination for a total of more than 24 calls. He asserted he was so tired of this harassment that he changed his cell phone number to avoid the battery of calls. Yet, through Ron Roman Exhibit No. 1 clearly demonstrated that Randall maintained the same cell phone number right through the completion of the ballot count and that same number was used frequently by Roman to contact Randall and to send him text messages concerning the election. Indeed, Roman testified that it was he who had constant and frequent contact with Randall about the election, and the texts contained on Exhibit 1 show that Randall actively engaged Roman in discussions about the election – not that he was frustrated or wanted to eschew contact. In short, Randall's testimony was unreliable in all relevant respects.

The upshot is that the record evidence reveals that Carey Neely Jr. played an insignificant role in the organizing drive. The limited nature and extent of his pro-union activity could not reasonably have the tendency to interfere with the free choice of employees in the election and did not have any of the indicia of coercion. Thus, the Employer has failed to carry its burden to prove even the first factor of the *Harborside Healthcare* test.

Therefore it is not necessary to discuss the second prong of that test other than to point out that after his termination there could not have been any lingering effect of whatever conduct he engaged in as his stature as an alleged supervisor had been utterly eradicated by that termination.

II. OBJECTION NO. 8 SHOULD BE DISMISSED

The Board's decision in *Stericycle, Inc.* 357 NLRB No. 61 (August 23, 2011) is dispositive of Objection No. 8. In *Stericycle*, the Board held that "[a] union engages in objection conduct warranting a second election by financing a lawsuit filed during the narrow time period – known as the 'critical period' – between the date of the filing of the representation petition and the date of the election . . . ."

The Board crafted this narrow exception recognizing core principles that "[U]nion assistance in the form of education about legal rights, referral to knowledgeable lawyers, and financing of litigation designed to vindicate workplace rights lies at the core of the union and other concerted activity for mutual aid and protection which the Act was intended to protect." (*Id*.) The Board continued to espouse the fundamental nature of the union's relationship to its member stating "[i]t is thus further settled that efforts by a union to educate its members about their employment rights and to initiate and fund litigation on behalf of its members enjoys both statutory and constitutional protection." [citations omitted]. (*Id*.) The Board discussed the scope of these protections to "[a]ssist workers to obtain legal redress even at times when the union does not represent the employees for collective bargaining. In fact, those are likely to be the times when employees are most in need of such assistance because, lacking union representation, they cannot remedy grievances through the simpler and less expensive process created by collective-bargaining agreements." (*Id*.)

Despite the Board imposing limitations on a union's involvement in employees filing suit during the "critical period," "[U]nion conduct to educate employees concerning their rights under labor laws remains protected and unobjectionable during the critical period before a representation election. Unions can inform employees about their rights, assist them in identifying violations, urge them to seek relief, and even refer them to competent counsel without casting into question the subsequent election results." (*Id*.) "Protected communication includes, but is not limited to, discussion of collective bargaining and the right to organize under the NLRA, employee rights under safety, health, and wage, and hour laws . . . . Finally, just as a union may refer employees to competent counsel without provoking a colorable objection, such counsel may file suit on behalf employees, even during the critical period, so long as the union does not fund the litigation . . . ." (*Id*.)

Based on the Evidence, the Employer Has Failed to Carry Its Burden

Petitioner has failed to meet its burden because the evidence does not show the union financed any litigation on behalf of Carey Neely Jr., Carey Neely III or any other claimant, let alone that said litigation occurred during the critical period. Petitioner's witness Travis Hoiseth offered little to no useful testimony. Mr. Hoiseth testified that he attended a pre-hearing conference on behalf of the employer (Tr. 589-590); that Mr. Roman's presence at the hearing was not in the capacity as an

attorney (Tr. 591, 592); that his first communication with an attorney representing the claimants was in October or November 2014 – after the election occurred (Tr. 592-593); and he had no idea about any of the details of the relationship between his counsel and the wage claimants (Tr. 593).

Conversely, union organizer Ron Roman's testimony reflects that his conduct amounted to *exactly* the "education" of employees a union is permitted to do within or outside the critical period. Mr. Roman began educating Neely Jr. about his rights under California law concerning meal and rest periods – which implicate not only his wages, but his health and safety as well – after Neely expressed his concerns about his final paycheck. (Tr. 786-787). Mr. Roman thereafter provided Cary Neely Jr. information from the Department of Industrial Relations website and offered to assist him with the paperwork (Tr. 787-788). He provided similar assistance to Carey Neely III and Douglas Dunston but the bulk of the work was done independently (Tr. 791).

Never did Mr. Roman represent to Neely Jr. that the union would provide any legal counsel (788); he attended the pre-hearing conference at the Labor Commissioner's office to simply help Neely Jr. (Tr. 790). Only when the action was set for hearing did Mr. Roman refer the unrepresented wage claimants to competent counsel who was subsequently retained in late October 2014, well after the election occurred. (Tr. 792- 793). In all, Mr. Roman's testimony confirmed that he engaged in unobjectionable conduct and the union never financed the legal representation for the three wage claimants. (Tr. 791-792, 794).

Both Neelys' testimony confirms that the union never financed the litigation and thereby never engaged in objectionable conduct. At the time of filing their initial complaints with the Labor Commissioner, all three claimants had been terminated. (Tr. 720; 661). Neely Jr. confirmed that Mr. Roman had informed him of his rights to meal and rest periods under California state law and this information was passed on to Neely III. (Tr. 721; 661-662). Neely Jr. testified that it was he who wanted to file his wage claim with the Labor Commissioner. (Tr. 751). Mr. Roman thereafter informed Neely Jr. of and assisted him in filing a wage claim with the Labor Commissioner (Tr. 722-723). Neely III was assisted by an individual at the Labor Commissioner's office (Tr. 662).

Two of the three wage claimants testified that the union has not paid their legal fees in connection with their Labor Commissioner claims and they were responsible for their own legal fees.

(Tr. 752; 676) Thereafter, they sought to obtain competent counsel independent of the union in late October 2014, well after the critical period began and after the election occurred. All three wage claimants met with an attorney, Mr. Nemiroff, in late-October 2014 in hopes of securing legal representation. (Tr. 723-724; 663-664). Upon Mr. Nemiroff assessing their case, he made an independent judgment in agreeing to represent them; it was the first time any of them had legal representation with respect to their wage claims. (Tr. 724; 664-665).

Conclusion

For all the reasons set forth herein, and on the record evidence, we respectfully request that each of the employer's objections be dismissed.

Respectfully,

Dated: LAW OFFICE OF KENNETH C. ABSALOM

/s/ Kenneth C. Absalom

Kenneth C. Absalom

Attorney for Petitioner

CERTIFICATE OF SERVICE

Randy Bravo-Chavez declares as follows:

I am over 18 years of age, and not a party to the within action. I am employed at and my place of business is 220 Montgomery Street, Suite 905, San Francisco, California 94104.

On June 9, 2015, I served the document(s) below:

PETITIONER OPERATING ENGINE LOCAL NO. 3'S BRIEF IN OPPOSITION TO EMPLOYER'S OBJECTIONS TO CONDUCT OF THE ELECTION

X (BY MAIL) by placing the original or a true copy of thereof enclosed in a sealed envelope with postage fully prepaid in the Unites States mail at San Francisco, California, addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business.

(BY FACSIMILE) by transmitting via facsimile on this date from fax number (415) 392-3729, the document(s) listed above to the fax number(s) set forth below. The transmission was reported complete without error. The transmission report was properly issued by the transmitting fax machine. The transmitting fax machine complies with Cal.R.Ct. 2003(3).

(BY OVERNIGHT DELIVERY) by placing the original or true copy thereof of the document(s) listed above in a sealed envelope(s) and consigning it to an overnight delivery carrier for guaranteed delivery on the next business day following the date of consignment to the address(es) set forth below. A copy of the consignment slip is attached to this proof of service.

DENNIS B. COOK, ESQ. CHRISTOPHER S. ALVAREZ, ESQ. COOK BROWN LLP 555 Capitol Mall, Suite 425 Sacramento, CA 95814-4503 Tel. 916-442-3100 Fax. 916-442-4227	

I declare under penalty of perjury under the laws of the State of California that the forgoing is true and correct. Executed at San Francisco, California on June 9, 2015.

Randy Bravo-Chavez